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FREE SPEECH AND GWOT: BACK TO THE FUTURE?

BY

COLONEL MICHAEL J. HARGIS
United States Army

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USAWC STRATEGY RESEARCH PROJECT

FREE SPEECH AND GWOT: BACK TO THE FUTURE?

by

Colonel Michael J. Hargis
United States Army

Colonel Michael Hoadley
Project Advisor

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

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The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech. . . ." Although the language of that provision may seem clear, the history of the United States is replete with examples of restrictions upon free speech, particularly during times of national crisis. This paper examines the reasons for protecting speech as well as the reasons allowing limitations. It also examines the historical limitations placed upon free speech during times of national crisis and the response of the courts to those restrictions. Next, this paper explains the current state of constitutional law as it relates to First Amendment restrictions and applies that law to Osama bin Laden's fatwa against the United States. Finally, this paper argues and concludes that the current law is inadequate to protect the United States, given the Global War on Terrorism, and suggests a return to a prior standard that protects free speech to the maximum extent possible, consistent with the needs of national security.

FREE SPEECH AND GWOT: BACK TO THE FUTURE?

> Congress shall make no law . . . abridging the freedom of speech. . . .
>
> —First Amendment, United States Constitution[1]

The text of the First Amendment would seem to provide, at least upon first glance, no cover for those who might want to restrict speech. Our national history, however, is replete with examples of exactly such restrictions; restrictions imposed during times of crisis when the continued existence of the United States arguably hung in the balance. Generally speaking, few would argue against the desirable benefits that derive from the First Amendment's protection of free speech. However, the United States finds itself, in the Global War on Terror (GWOT), on the receiving end of speech which advocates killing Americans and destroying America, including (but unfortunately not limited to) Osama bin Laden's fatwa.[2] Given that one source estimates that eighty percent of American mosques have been overtaken by radical Muslim clerics,[3] it is not hard to envision sermons in those mosques equivalent to Osama bin Laden's fatwa.[4]

Does the First Amendment's protection of free speech require protecting these sermons[5] at the potential cost of national security?[6] Some take the position that the First Amendment is an inviolable right, permitting no restrictions on free speech.[7] Conversely, given GWOT, is there truth to the Latin phrase *inter arma silent leges*?[8] The majority, it seems, believe the Constitution envisions that in times of national peril, such rights will be restricted.[9] Where, then, is the balance between free speech and national security?

In an effort to answer these questions, this paper compares reasons for and against restricting free speech and describes some of the historical limitations placed

upon speech during times of crisis. This discussion leads to an explanation of the current state of constitutional law on the issue. Upon that foundation – using Osama bin Laden's fatwa as an example of typical speech encountered here during GWOT -- this paper then argues that, given the GWOT, the current 1960's constitutional standard from *United States v. Brandenburg*[10] is obsolete and does not adequately provide for the United States' national security in GWOT. Ultimately, this paper concludes that the prior constitutional standard from *United States v. Dennis*[11] should be readopted, allowing for greater flexibility to restrict speech in the name of national security, while simultaneously protecting free speech to the maximum extent possible.

Clearly, if Osama bin Laden were in the United States, whether his fatwa is covered by the First Amendment's free speech protection would be the least of his problems. While this hypothetical – using Osama bin Laden's fatwa as an example of typical speech encountered here during GWOT -- may seem nonsensical at first glance, the author uses his language to graphically illustrate language which may be typical of that used in sermons in mosques across America, for the purpose of examining whether such language is – or should be -- constitutionally protected. Every judicial case is fact specific. From a constitutional perspective, the situation would be vastly different if bin Laden presented his fatwa to an assembly of hundreds of Islamic radicals, armed with weapons and swathed in suicide belts, ready to follow his exhortations.[12] Those facts -- where lawless action is imminent -- would not be constitutionally protected, even under the current *Brandenburg* standard. To make the constitutional question clearer, we will assume only that bin Laden – or someone like him -- spoke to a congregation of worshippers at an American mosque. Our hypothetical situation thus addresses the

harder constitutional question: Whether advocating the religious necessity of killing Americans and destroying America, without a close temporal connection to lawless action, is or should be constitutionally protected.

Protecting and Restricting Free Speech: The Arguments

Protecting free speech is "an essential corollary of self-governance."[13] According to Mr. Stone's *Perilous Times*, in a democracy, the people decide the course of the country, rather than a single monarch. In a monarchy, the people are merely along for the ride (rather than actively controlling the tiller), so "they need not be well-informed."[14] However, when the people chart a country's course through the ballot box, they need to be able to sort the good ideas from those less worthy of adoption. They do this in the "marketplace of ideas."[15] This concept, under girding the First Amendment's protection of free speech, envisions a free exchange of ideas and beliefs, where all citizens are free to consider all points of view, choosing for themselves which have merit and should be adopted. Under this concept, to limit free speech is to deprive the citizenry of the chance to consider an idea, which might be worthy of adoption.

A related function of the "marketplace of ideas", Stone notes, is the benefit to personal decision-making (beyond that necessary to intelligently vote). If the people have all information available to them, then all their decisions – "including not only whether to support a particular political candidate, but also whether to have children, enlist in the army, contribute to one's church, buy a Saab, or go to law school – will be based on the best information available."[16]

The basic idea that the First Amendment protects a "marketplace of ideas" is not a new concept, but it is a concept with continued vitality. As the most recent National

Security Strategy attests: "[D]emocracy offers freedom of speech, independent media, and the marketplace of ideas, which can expose and discredit falsehoods, prejudices, and dishonest propaganda."[17] The United States Supreme Court has also recognized this as a basis for the First Amendment's protection of free speech:

> We pointed out . . . that the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse.[18]

A second reason to protect free speech arises from the very debate of ideas in the marketplace. During the debate, people are required to exercise judgment, scrupulously defining the ideas and then comparing the merits of one over another. As a result, the "First Amendment promotes the emergence of character traits that are essential to a well-functioning democracy, including tolerance, skepticism, personal responsibility, curiosity, distrust of authority, and independence of mind."[19]

Protecting free speech also limits the natural tendency of public officials to "perpetuate their power."[20] This third reason implicitly adopts the Hobbesian view of man,[21] arguing protected speech prevents those in power from controlling the information given to the people – those who ultimately make the decisions – so as to slant those decisions in favor of the people or policies of those in power.[22]

Fourth, those who do not believe their views have been heard are less likely to buy into the decision ultimately made.[23] However, those who participate in the discourse prior to the decision are less likely to substitute "force for reason."[24]

A fifth reason to protect free speech is to "protect[] individual self-fulfillment."[25] By protecting individual rights, the government implicitly recognizes the worth of each individual, making that government more worthy of the individual's support.[26]

Judge Robert Posner, of the United States Court of Appeals for the Seventh Circuit, also believes imposing restrictions on free speech (particularly as it relates to GWOT, such as prohibiting preaching radical Islam that espouses killing all those who are non-believers), has two negative consequences in the current environment. First, he argues that such restrictions would unduly alienate the Muslim population in the United States – a population that is not by and large radicalized at this point.[27] Second, he believes that restricting such speech would not eliminate it, but would only drive it underground, thus making it harder to obtain needed intelligence and law enforcement information.[28]

The Supreme Court has also recognized that constitutional protections, while at times inconvenient, are vital to a functioning democracy. In one Court's view, protecting free speech – and protecting it inviolate – prevents those leaders who might not have the country's best interests at heart from abusing free speech restrictions to country's ultimate detriment.

In *Ex parte Milligan*,[29] Justice Davis spoke for the Court when he said:

> Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rules and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of*

> *government.* Such a doctrine leads directly to anarchy or despotism. . . .[30](Emphasis added.)
>
> This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if [the ability to change constitutional rights during times of perceived crisis] . . . is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.[31]

Justice Davis is clear. He does not believe that altering constitutional protections to answer a short-term crisis is acceptable, for to do so takes us down a slippery slope toward abuse by leaders whose motives are less than pure. Just as protections within the criminal justice system may seem to foil the ability to prosecute those "clearly" in violation of the law, those protections are there to prevent the government from turning on the innocent.[32]

While these several reasons for protecting speech are valid, the initial one and its corollary are, this author submits, the most fundamental. A functioning democracy – whether or not faced with a crisis -- requires that its citizens be personally responsible for their own decisions. To hold otherwise would be to endorse socialism, where decisions are made by the state. Personal responsibility -- whether exercised to respond to the call to vote, or to decide which brand of coffee to purchase -- requires an unimpeded flow of information upon which to make responsible decisions.

Certainly some speech does nothing to help the citizens of a democracy either govern themselves or live their lives. Such speech falls outside the basic purposes for which we rightly protect it, and therefore, can rightly be restricted. The Supreme Court has consistently found limits to the First Amendment's coverage; pornography, libel and the like are unprotected.[33] Shouting fire in a crowded theater, uttering words that will

provoke another to violence[34] or distributing child pornography does nothing to help us decide which governmental policies to support or which actions in our personal lives deserve our attention (except maybe to join an organization dedicated to eliminating the latter).[35] Moreover, free speech rights vary by the age of the speaker and that speaker's location.[36] Accordingly – and appropriately – some forms of speech fall outside First Amendment's protections.

Finally, as stated by Justice Frankfurter in his concurring opinion in *Dennis v. United States*, the documents upon which the First Amendment was based allowed for restrictions on speech; accordingly those who wrote the First Amendment must not have intended it to be a complete and inviolate protection of all speech.[37]

Free Speech and National Security: The Philosophical Tension

There have been those on the Supreme Court (and lower courts) who have said that when balanced against national security, the First Amendment's right to free speech – even if unlimited -- must yield.[38]

Justice Jackson's dissent in the Supreme Court case of *Terminello v. Chicago*[39] is an example of this balance. Mr. Terminello belonged to a group known as the Christian Veterans of America. During a speech he gave to a packed house in Chicago, he "vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[40] The crowd inside was vocal in its support; the crowd outside was equally vocal in protesting his speech, requiring police intervention to quell the disturbance and prevent a riot.[41] As a result, Mr. Terminello was arrested for, and after a jury trial, convicted of violating a local ordinance that prohibited breaches of the peace and disorderly conduct.[42]

Justice Douglas, writing for the majority, held such a conviction contrary to the free speech protections of the First Amendment.[43] He stated that such a restriction on free speech as inimical to the very purpose of the First Amendment's protections -- the vigorous debate in the marketplace of ideas -- even if such debate becomes contentious.[44]

Justice Jackson, on the other hand, believed the courts must be practical in their interpretation of constitutional rights. In his dissent, he took issue with what he viewed to be an overly academic interpretation[45] of the First Amendment. He viewed the situation during Mr. Terminello's speech as a near-riot.[46] In addition – and importantly – he viewed that near-riot to be just a proxy for a greater conflict between communists and fascists that threatened America, just as it had recently consumed Europe.[47] Thus he viewed the situation in which Mr. Terminello gave his speech to be entirely consistent with prior Supreme Court cases upholding restrictions on free speech in situations that "tend to incite an immediate breach of the peace."[48] He viewed the Court's reversal of Mr. Terminello's conviction as the over-protection of constitutional rights at the potential cost of the entire nation's liberty. Justice Jackson believed that such (in his view) slavish adherence to complete protection of free speech in all circumstances, particularly when the continued existence of the nation was potentially at risk, is unwise and not constitutionally required:

> I begin with the oft-forgotten principle which this case demonstrates, that freedom of speech exists only under law and not independently of it.[49]
>
> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints from these crowds and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper

> its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.[50]

Others have taken a similar view; that while protecting rights is a worthwhile endeavor, it must take a back seat when the nation faces a crisis. Following Judge Posner's view, although it is unwise to impose restrictions on a cleric's Osama bin Laden-like speech at this point, the Constitution does not require unfettered protection of free speech.[51] Citing to his own court's opinion in *Alliance to End Repression v. City of Chicago*,[52] he adopts the philosophy that while groups "may not *yet* be engaged" in activity that violates federal law, they may be about to do so (or may be affiliated with another group that is violating federal law),[53] justifying restrictions upon their speech.

Nor are such pragmatic views limited to this country. In 1970, when the Quebec separatist movement, Le Front de Liberation du Quebec (FLQ), kidnapped a Canadian cabinet minister, the Canadian Prime Minister imposed its War Measures Act that significantly limited the rights of Canadian citizens.[54] Speaking of that incident, then-Canadian Attorney General John Turner said: "When placed against the wall, most governments act more alike than differently; they do what they have to do to survive."[55] America is apparently not immune. When it comes to the First Amendment, American history has a consistent theme – restricting freedom of speech during times of crisis. [56]

<u>Free Speech and National Security: The Historical Perspective</u>

The First Amendment's protection of the freedom of speech became effective in 1791. That freedom of speech, enshrined in our country's most fundamental document, went unmolested for only seven years.

After the fall of the French monarchy, the European monarchies (including England) had declared war on the French Republic.[57] Although the United States tried

to remain neutral, it eventually found itself caught in the middle of the conflict between France and England, with both nations interdicting American shipping and taking her sailors captive.[58] By the late 1790s, the continued existence of the new nation arguably teetered on the brink.

With this as background, the two American political parties – the Federalists and the Republicans – were at each other's throats. The Federalists, led by President John Adams, opposed any reconciliation with France and believed the best route to national salvation lay with an alliance with England.[59] The Republicans, led by Vice President Thomas Jefferson and James Madison, saw any alliance with a monarchy to be the potential death knell of American democracy; they believed salvation lay with the French.[60] Both parties publicly accused each other of being disloyal and treasonous to America.[61]

To muzzle Republican dissent, in 1798, a Federalist Congress enacted the Sedition Act.[62] The Sedition Act made it a criminal offense for anyone to "write, print, utter or publish . . . any false, scandalous or malicious writing . . . against the government of the United States. . . ."[63] Prior to its expiration in 1801, ten people were ultimately convicted of violating the Sedition Act – all Republicans.[64] Far from interceding to protect nescient civil liberties enshrined in the First Amendment, the Supreme Court provided justices who presided over these trials.[65] Although the Sedition Act provides no useful judicial review upon which to draw, it does show Americans do not hesitate to restrict free speech when faced with crisis.

The First World War provided another example of restrictions placed on free speech in the name of national security. During that period, the Congress enacted the

Espionage Act of 1917, which prohibited (among other things) "causing [or] attempting to cause insubordination . . . in the military. . . ."[66] The most significant case to arise from application of the Espionage Act was *Schenk v. United States*.[67] In that case, Scheck was charged and convicted for printing and distributing 15,000 copies of a leaflet urging disobedience to the draft, which Schenk (the general secretary of the Socialist party in America) believed to be the functional equivalent of involuntary servitude.[68] Because speech – here, the contents of the leaflets -- was the evidence showing the violation of the Espionage Act, the Court addressed the First Amendment implications. Justice Holmes wrote the opinion for the Court, in which he set forth what would become the litmus test for restrictions upon free speech:

> [The] question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.[69] (Emphasis added.)

For Justice Holmes, Congress certainly had the right to enact legislation to prevent insubordination in the military during a time of war. Accordingly, applying his litmus test, he (and a unanimous Supreme Court) found the evidence (the leaflets) sufficient to support Schenk's conviction.

In two later cases from that era, *Gitlow v*. *New York*[70] and *Whitney v*. *California,*[71] the Court addressed the constitutionality of two state statutes[72] that sought to prohibit speech itself – in these cases, advocating the overthrow of the government by violence.[73] In both cases, the Court affirmed the convictions, finding that the government did have the authority to take actions to preserve its own existence as a government, even if that meant restricting speech.[74] At this point, the Courts found no

prohibition against restricting free speech that advocated criminal conduct or violent change in government.

The Second World War and the Cold War / Communist scare that followed again brought examples of restrictions upon unfettered speech. Mr. Dennis, a leader of the Communist Party in the United States, was charged with and convicted of a violation of the Smith Act,[75] making it a crime for any person knowingly or willfully to advocate the overthrow or destruction of the government of the United States by force or violence. Struggling to determine the correct application of the "clear and present danger" test from *Schenck*, Justice Vinson, writing for the Court, said:

> Obviously, the words ["clear and present danger"] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.[76]

> Chief Judge Learned Hand, writing for the majority below, interpreted the [*Schenck* standard of "clear and present danger"] . . . as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. We adopt this statement of the rule.[77]

Applying that interpretation of Justice Holmes' "clear and present danger" rule from *Schenck*, the Court found Mr. Dennis' actions in operating the Communist Party from 1945-1948 were of sufficient gravity to justify the invasion of free speech; the Court affirmed his conviction.

So, as of *Dennis v. United States*, the Supreme Court took the position that speech advocating the violent overthrow of the government was a sufficient threat to be outside the protections of the First Amendment. Significantly, in *Dennis*, the Court did not take the position that strict temporal proximity between the harm to be avoided and

the speech to be punished was required before a restriction on speech could be constitutional. Clearly, by this point, the Court sided with national security over unfettered free speech.[78]

The Current State of the Law and Osama's Fatwa

As of *Dennis v. United States*, the Supreme Court had adopted the "balancing" interpretation of the *Schenck* "clear and present danger" standard (created by Judge Hand), above. In 1969, the United States Supreme Court again took up the issue of appropriate limits on free speech in the case of Mr. Clarence Brandenburg, the Grand Dragon of the Ohio Ku Klux Klan. During a videotaped Klan rally, Brandenburg made numerous derogatory statements against Jews and non-whites, and made mention of potential "revengence" against the United States government.[79] Although apparently unarmed, others in the video were armed.[80] After his arrest, Mr. Brandenburg was convicted of an Ohio syndicalism statute that prohibited the advocacy of accomplishing political reform through violence.[81]

On review of his conviction, the United States Supreme Court reversed. In a *per curiam* opinion, the Court said their prior case law would have upheld the conviction; that under that prior case law, merely advocating violent political change was of sufficient danger to the continued existence of the state that it could be criminally prohibited.[82] More specifically to our situation, the Court said that their prior precedent (*Schenck*, *Gitlow* and *Whitney*) even restricted "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence. . . ."[83] However, *Brandenburg* held and that such "mere abstract teaching . . . is not the same as preparing a group for violent action and steeling it to such action. . ."[84], and reset the

bar, establishing a standard that only allowed restricting free speech when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[85] Thus, with *Brandenburg*, the Court added a requirement that "imminent lawless action"[86] must likely be the product of the speech sought restricted; no likely "imminent lawless action", no constitutional restriction of free speech.

The *Brandenburg* standard is the current standard by which First Amendment restrictions are judged. Justice Thomas recently referred to the *Brandenburg* standard as the current law when it comes to First Amendment restrictions.[87]

So where does that leave us now? Recall the hypothetical set forth at the beginning of this paper; under *Brandenburg*, Osama bin Laden's fatwa as part of a sermon at an American mosque[88] arguably would be protected speech, as "the mere abstract teaching . . . of the . . . moral necessity for [the] resort to force and violence. . . ."[89]

A Suggested Approach

The First Amendment is not without limits.[90] However, to allow only those restrictions that prevent incitement to "imminent lawless action" (as does *Brandenburg*) is too restrictive during GWOT -- particularly in light of the potential damage that can come from a terrorist attack. Justice Stevens recognized just that when he filed his statement opposing the denial of certiorari in *Stewart v. McCoy*.[91]

Should we abandon the "imminence" standard? The arena of a state's right to self-defense provides a useful analogy.

Preemptive self-defense, as customary international law,[92] allows a country to attack another country when threat of attack from that other country is "imminent."[93] Preventive self-defense, on the other hand, does not limit military action to those situations where an attack is "imminent"; it allows military action when a threat is identified, even though the potential for attack is not temporally immediate.[94]

Although phrased in terms of preemption, the Bush administration takes the position that United States national policy against terrorists should be one of preventive attacks, given the nature of the threat we face.[95] This administration states the United States Government's "first duty . . . remains what it has always been: to protect the American people and American interests."[96] We are not faced with a conventional threat that will take time to prepare an open attack, with preparations that will be detectable by standard military surveillance platforms. Today's enemy has used weapons that we either did not consider as "weapons" or failed to aggressively defend against – until the enemy actually employed them. Our contemporary enemy will covertly use weapons of mass destruction – including nuclear weapons, if available to them. We are faced with an enemy whose preparations to employ such weapons will not be visible to us in any conventional manner; the first we may know of their intent to use them will be detonation of the weapon. This combination of inability to detect, the covert nature of the attack – that is, our inability to detect if an attack is "imminent" – combined with the catastrophic nature of the potential damage, has fundamentally changed the way we employ force, as the Bush administration notes in the National Security Strategy.[97]

For the same reasons, a standard for the restriction of free speech that relies upon a requirement that a threat be "imminent" is obsolete, in light of the GWOT.[98] As Judge Posner astutely noted, *Brandenburg* does not indicate that the imminence of the threat is the only factor to be considered.[99] Accordingly, reverting to the "balancing" standard from *Dennis* would provide the needed flexibility to respond appropriately to critical threats, while at the same time, protecting free speech to the maximum extent possible.

Recall that the Court in *Dennis* adopted the following standard, set out by the lower appellate court: "[T]he gravity of the 'evil,' discounted by its improbability, justifies [the]. . . invasion of free speech as . . . necessary to avoid the danger."[100] Given today's environment,[101] this standard is appropriate for six principle reasons.

First, Brandenburg's "imminent" standard has been – and should be -- strictly interpreted. Recall that *Hess* and *Claiborne Hardware* placed fairly restrictive temporal limits on the *Brandenburg* test.[102] To interpret it loosely is to remove any protection the term might provide, should we choose to use it for the constitutional standard. Just as the Bush administration's arguably loose use of the term "preemption" could deprive the United States of legitimacy should we engage in military action that would clearly be preemptive,[103] expansive use of the term "imminent" would render any protection that term might provide meaningless.[104] Certainly, an argument can be made that a sermon such as Osama bin Laden's fatwa should fall within the term "imminent" and thus fall outside even *Brandenburg*. "Sermons in all religions are [by] their very nature not merely speeches that advocate ideas in the abstract [and would thus be protected under *Brandenburg*]; rather, they are designed to convince followers to take certain prescribed actions."[105] But an appropriately narrow interpretation of "imminent" means

such speech – if it does not provoke or incite lawless action within a short period of time -- would be protected. Given the secretive nature of the threat and the catastrophic harm it could cause, this risk is unacceptable.

Second, *Brandenburg* does not address the gravity of the harm, but only its temporal proximity.[106] At the risk of repetition, given the catastrophic nature of the harm that could be caused, failure to consider the gravity of that harm in the calculus is to run an unacceptable risk. The *Dennis* standard affirmatively addresses the gravity of the harm in its analysis.[107]

Third, the *Dennis* standard does require consideration of a temporal element akin to the current "imminent" standard, within its element of "discounted by its improbability. . . ."[108] Determining the improbability of any event requires consideration of not only the chances it may happen (probability), but how soon it would occur (temporality). As Judge Posner notes, a catastrophic event occurring years from now may justify greater restrictions than a less-catastrophic event occurring tomorrow.[109] However, as Justice Vinson noted, the *Dennis* standard does not require a finger on the trigger.[110]

Fourth, such a flexible standard protects speech to the maximum extent practicable. To the extent the threat from the speech is small, the speech is protected. However, when the threat from the speech is great, restrictions on speech would be acceptable. Additionally, this standard requires that any actions by the government be narrowly tailored – that is, "necessary" -- to avoid the threat. Precision would be required to survive constitutional scrutiny and measures not strictly required to prevent the danger, regardless of their salutary nature, would be unconstitutional.[111]

Fifth, comments like those from Osama bin Laden do not contribute to the marketplace of ideas and are inconsistent with the purposes for which the First Amendment was enacted, as noted previously. Whether Osama bin Laden's fatwa serves any of the above reasons to protect free speech should play a large role in determining the constitutionality of restricting it.

Osama bin Laden's fatwa does nothing to contribute "an essential corollary of self-governance."[112] He is advocating violent overthrow of the government; he is not operating within it. Thus, his idea does nothing to help the American people when they approach the ballot box.

For the same reason, his fatwa does nothing to develop the skills "essential to a well-functioning democracy"[113] as he is advocating overthrow of that democracy.

While controlling this speech could arguably result in controlling other speech (potentially enabling those in power to stay there by manipulating information available to the public), the standard proposed would guard against such an outcome. The proposed standard requires strict tailoring of the restriction to the threat, minimizing restriction of "collateral" speech.

Thankfully, Osama's view of the need for violent overthrow of our government has not taken root in America. Thus, the danger that suppressed speech will cause Americans to substitute "force for reason"[114] is not present.

Although certainly if we restrict speech similar to Osama bin Laden's fatwa, we are preventing the speaker from being self-fulfilled, American history is replete with restrictions on violent speech and activities that can lead to violence. Because those

restrictions have been put in place by the instruments of American democracy, they do not detract from the individual citizen's support for the government.[115]

Finally, as Justice Jackson so eloquently put it, the Constitution is not a suicide pact. We must realize that the enemy today has the will to destroy this country. The enemy merely seeks the means to do so and awaits their opportunity.[116] When he acts, the enemy will act covertly, such that we likely will not be aware of an impending attack.[117] Under such circumstances, our Constitution should not be required to shield speech that directly advocates our country's destruction and the death of her citizens.

Certainly the justices who decided *Brandenburg* did not accept *Dennis* as a workable standard[118]; Justice Douglas was far from taken with *Dennis*.[119] Admittedly, some who do not believe speech like Osama bin Laden's should be protected do not advocate returning to the *Dennis* standard.[120]

An argument against the *Dennis* standard is the amount of discretion such a flexible standard gives the judiciary.[121] However, judges routinely use discretion daily to make decisions, even decisions of constitutional magnitude. For example, when determining probable cause (that is, reasonable ground for belief of guilt) under the Fifth Amendment, the "standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."[122] Such a constitutional standard arguably vests more discretion with the judiciary than would the *Dennis* standard, yet this author's research has found no widespread call for amendment to this standard.

There are those who believe that we must, at all costs, protect freedom of speech and that once we chip away at a constitutional right, we endanger the entirety of our

democratic system. To those who believe we should, above all, protect free speech, I have three responses.

First, the Supreme Court has determined that the First Amendment is not as clear as its language alone would imply. As noted above, the First Amendment has been held inapplicable to a number of categories of speech.[123] A flexible standard, as suggested above, does no additional violence to years of constitutional jurisprudence.

Second, the judiciary is the impartial interpreter of governmental action that may be contrary to the Constitution. Professor Alan Dershowitz, of Harvard Law School, has championed the role of the courts as the impartial defender of constitutional rights. In his view, it is exactly when national security is threatened that the courts must be the most vigorous in their defense against encroachments of these rights in the name of national security.[124] While it is true the judiciary has not always done the best job of being the impartial arbiter of constitutional protections,[125] neither has the judiciary been silent when it comes to constitutional encroachments.[126]

Finally, the protection of free speech depends upon the continued existence of our country; the converse is not necessarily true.[127] If the choice is between our nation's destruction and preventing someone from presenting a point of view that advocates such, this author freely and willingly supports restricting that speech.

Conclusion

The *Brandenburg* standard, with its requirement for "imminent lawless action", is obsolete in today's environment. Stretching the definition of "imminent" to fit the factual situation presented here is disingenuous and undermines the integrity of the judicial system. Conversely, the *Dennis* standard is a flexible, rational standard that can

address the nature of the GWOT threat while simultaneously guarding free speech to the maximum extent possible.

Applying *Brandenburg* to our hypothetical situation -- bin Osama bin Laden giving his fatwa to a congregation of worshippers at an American mosque – his speech would arguably be constitutionally protected because it lacks imminence. *Brandenburg's* imminence test assumes, of necessity, awareness of the potential attack. Today's enemy, however, seeks to destroy us with weapons of mass destruction "under the radar." In the GWOT, we may not know of an impending attack until it is complete – with catastrophic results. Our enemy is urged on by clerics spouting rhetoric like Osama bin Laden's fatwa -- even in mosques in America. Faced with speech advocating killing Americans and the destroying America, combined with covertly employed weapons capable of immense destruction and loss of life, our national security cannot wait for "the putsch."[128] Applying the balancing test from *Dennis,* bin Laden's speech – although not inciting imminent lawless action -- would arguably not be constitutionally protected. Under the *Dennis* standard, imminence is still a consideration, but not the controlling consideration; we can also consider the gravity of the harm – destruction of America. At the same time, the government cannot restrict speech beyond that "necessary" to address that danger.

Are we so naïve as to believe that protecting a radical's right to spew his venom is more important than the continued existence of the United States? I hope not. With my apologies to Mr. Franklin, he who seeks to protect free speech at the cost of national security will likely have neither.[129]

Endnotes

[1] U.S. Constitution, First Amendment. Although the clear text of this provision of the First Amendment applies this prohibition to Congress alone, later interpretation of this provision, in light of the 14th Amendment ("No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. . . ."), extended this prohibition to any governmental agency, including the states. *Gitlow v. New York*, 268 U.S. 652 (1925)

[2] "[K]ill[ing] the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it. . . [so as to destroy their government and way of life]." This is based on an excerpt from a transcript of Osama bin Laden's February 23, 1998 fatwa. Online NewsHour, "Al Qaeda's Fatwa", available from http://www.pbs.org/newshour/ terrorism/international/fatwa_1998.html; Internet; accessed 10 December 2007.

[3] Jake Tapper, "The Bully Pulpit", *Talk Magazine*, February 2002, 38-39, quoted in John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm.,* no. 17 (Winter/Spring 2003): 199, 201, n. 13.

[4] Such has already occurred. See John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm.,* no. 17 (Winter/Spring 2003): 199, 201, n. 13, citing the speeches of Shiek Omar Abdel Rahman; and Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", *Am. U. L. Rev.,* no.55 (February 2006): 785, citing the speeches of Ali al-Timimi. Both these Islamic clerics spoke in the United States.

All cases are fact specific. These two examples included actions by the cleric and his followers to carry out the advocated threats contained in their statements. From an academic standpoint, evaluating "pure" speech is more useful, so this paper will limit the hypothetical sermon to the speech alone, apart from any actions that may accompany it or be caused by it. Although obviously an arrest and conviction would be required for Supreme Court review and application of a constitutional standard, for the purposes of this paper, we will not directly evaluate Osama bin Laden's comments any against existing federal criminal statutes, such as U.S. Code, Title 18, Section 2385, Advocating Overthrow of Government; U.S. Code, Title 18, Section 371, Conspiracy; U.S. Code, Title 18, Section 2384, Seditious Conspiracy, or; U.S. Code, Title 18, Section 373, Solicitation to commit a crime of violence. We will assume the required predicate conviction and consider only the constitutional standard applicable to review of such criminal provisions, from a First Amendment perspective.

[5] Any argument that such otherwise criminal speech is insulated because of First Amendment *religious* protection was addressed by Justice Reed, albeit in dicta, in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 109 (1952): "Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense." Accordingly, this paper will not consider any First Amendment freedom of religion implications -- but only the First Amendment speech implications -- of language spoken by clerics, akin to Osama bin Laden's fatwa.

[6] Andrew C. McCarthy's article, "Free Speech for Terrorists?", March 2005; available from https://www.commentarymagazine.com/viewarticle.cfm/Free-Speech-for-Terrorists--

9864?page=all; accessed 13 February 2008, succinctly phrases the argument in terms of the marketplace of ideas:

> The point of a market is a free exchange. Terrorism perverts the very concept: seeking to compel acceptance not by persuasion but by fear, it is an exchange at the point of a gun. When it fails to win such acceptance, it does not go back to the drawing board to develop a better message or write a better book. It kills, massively. Why then should government hesitate either to ban al-Manar or to use every legal tool in its arsenal, including criminal prosecution, to convey in the strongest terms that the advocacy of terrorism in this day and age is entitled to no First Amendment protection?

[7] This viewpoint is supported by Justice Davis in *Ex parte Milligan*, 71 U.S. 2 at 120 (1866) (that the First Amendment is "irrepealable"). See also Justice Black, dissenting in *Konigsburg v. State Bar of California*, 366 U.S. 36, 61 (1961): "As I have indicated many times before, I . . . believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech . . . shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."

[8] Translation: In time of war, the laws are silent. Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 9.

[9] This viewpoint is taken by Justice Jackson in *Terminello v. Chicago*, 337 U.S. 1 at 37 (1949) (that the Constitution is "not a suicide pact").

[10] *Brandenburg v. Ohio*, 395 U.S. 444 at 447 (1969) established the current test. To be outside constitutional protection, the restricted speech must be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."

[11] *Dennis v. United States*, 391 U.S. 494 at 510 (1951) stated the prior standard: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

[12] Mr. Cohen makes this very point:

> In cases involving religious sermons, the particular circumstances of delivery may be relevant. When a call to overthrow the "infidel" government is delivered by an earnest orator in a fiery manner to an impassioned, frenzied throng, the question of "proximity and degree" of danger may well be imminent, compared to a setting in which the delivery is lukewarm and the audience docile. If the adherents of the defendant's sect are an angry mob or in some other state of agitation, that circumstance is relevant because they are more amenable to be incited to undertake imminent lawless action.

John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm.,* no. 17 (Winter/Spring 2003): 199, 219.

[13] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 7.

[14] Ibid.

[15] The concept of a "marketplace of ideas" was first described by Justice Holmes:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616 at 630 (1919) (Holmes, J., dissenting). Author Elmer Holmes Davis captured this "marketplace" concept in non-legalese: "This nation was conceived in liberty and dedicated to the principle – among others – that honest men may honestly disagree; that if they all say what they think, a majority of the people will be able to distinguish truth from error; that in the competition of the marketplace of ideas, the sounder ideas will in the long run win out." Elmer H. Davis, *But We Were Born Free* (Indianapolis: Bobbs-Merrill, 1954), 114.

[16] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 8.

[17] George W. Bush, *National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 11. The Congress apparently recognized the government should not be contributing to misleading information or propaganda in 1948 when it enacted the Smith-Mundt Act (U.S. Code. Title 22, Section 1461), which essentially prohibits the government from directing propaganda at the American public.

[18] *Dennis v. United States*, 391 U.S. 494 at 506 (1951). See also Justice O'Conner's recent reiteration of the same concept in *Virginia v. Black*, 538 U.S. 343 at 358 (2003): "The hallmark of the protection of free speech is to allow 'free trade in ideas' -- even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams* v. *United States,* 250 U.S. 616, 630 . . . (1919) (Holmes, J., dissenting). . . ."

[19] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 7.

[20] Ibid, 8.

[21] While certainly an over-simplification of Thomas Hobbes, I believe it an accurate summary to say he believed human beings are by nature concerned with their own well-being. According to Hobbes, people are not, in general, naturally altruistic and when given a choice, they will take the choice that benefits them most. He wrote: "[T]he condition of man . . . is a condition of war of every one against every one: in which case every one is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemies. . . ." Thomas Hobbes, *Leviathan* (Chicago: Henry Regnery Company, 1956) quoted in W.T. Jones, *A History of Western Philosophy, Hobbes to Hume* (New York: Harcourt, Brace and World, Inc., 1952), 146. This is not to say that people cannot act altruistically; certainly they can. However, when stripped of all external and internal influences on behavior, I believe that people will act, as Hobbes stated, in their own self-interest.

[22] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 8.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Richard A. Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), 124.

[28] Ibid., 125.

[29] *Ex parte Milligan*, 71 U.S. 2 (1866).

[30] Ibid., 120.

[31] Ibid., 125.

[32] "Blackstone (1753-1765) maintains that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.' 2 Bl. Com. c. 27, margin page 358, ad finem." *Coffin v. United States*, 156 U.S. 432 at 456 (1895). This debate is not new. St. Thomas More also supported that position, at least in literature:

Lady Alice More: Arrest him!

St. Thomas More: For what?

Lady Alice More: He's dangerous!

William Roper: For all we know, he's a spy!

Margaret More: Father, that man's bad!

St. Thomas More: There's no law against that.

William Roper: There is – God's Law!

St. Thomas More: Then let God arrest him.

Lady Alice More: While you talk, he's gone!

St. Thomas More: And go he should, if he were the Devil himself, until he broke the law.

William Roper: So, now you give the Devil the benefit of the law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

St. Thomas More: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? The country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down – and you're just the man to do it! – do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake!

Robert Bolt, *A Man for All Seasons*, cited in Andrew P. Napolitano, C*onstitutional Chaos* (Nashville: Thomas Nelson, Inc., 2004).

[33] The Supreme Court has never held the First Amendment's protection of free speech to be completely without limits. See *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572, *infra*, note 48.

[34] To the extent that Osama bin Laden's fatwa incites another to imminent lawless action (under the *Brandenburg* test), it would fall outside the First Amendment's marketplace purpose because opposing speech would have no time to counter it in the marketplace. See, generally, Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", *Am. U. L. Rev.,* no.55 (February 2006): 785, 798. This commentator has also suggested a related reason why similar speech should be outside First Amendment protection – if done in secret, likewise it cannot be effectively countered by other ideas in the marketplace. Ibid., 791.

[35] See *Schenck v. United States*, 249 U.S. 47 at 52 (1919) (Justice Holmes determining that "falsely shouting 'fire' in a [crowded] theater" is not protected speech); *Cohen* v. *California,* 403 U.S. 15 at 20 (1971) (Justice Harlan saying "fighting words" are not protected speech); and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (Justice Kennedy saying that child pornography is not protected speech).

[36] Most recently, the Supreme Court has held that free speech within a school setting can be restricted when that speech is "reasonably" viewed as promoting illegal activity, such as drug use (see *Morse v. Frederick*, __ U.S. ___ (2007) (holding a sign stating "Bong Hits 4 Jesus" is not protected speech when displayed during a school sponsored event). "[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 at 682 (1986).

[37] Justice Frankfurter did not balance two absolute rights – free speech and national self-defense. Instead, he took the position that free speech itself was not absolute:

> But even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable Constitutional limitations. See *Hamilton* v. *Kentucky Distilleries Co*., 251 U.S. 146, 156. Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergency, although the scope of a restriction may depend on the circumstances in which it is invoked.
>
> The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are. The First Amendment categorically demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right of a

man to think what he pleases, to write what he thinks, and to have his thoughts made available for others to hear or read has an engaging ring of universality. The Smith Act and this conviction under it no doubt restrict the exercise of free speech and assembly. Does that, without more, dispose of the matter?

Just as there are those who regard as invulnerable every measure for which the claim of national survival is invoked, there are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future. The soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest.

Dennis v. United States, 341 U.S. 494 at 520-521 (1951).

[38] Justice Holmes would fall into this category, writing for the Court in *Schenk v. United States*, 249 U.S. 47 at 52 (1919):

When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

[39] *Terminello v. Chicago*, 337 U.S. 1 (1949).

[40] Ibid., 3.

[41] Ibid.

[42] The ordinance at issue said:

All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

Municipal Code of Chicago, 1939, Section 193-1.

[43] *Terminello v. Chicago*, 337 U.S. 1 at 5 (1949).

[44] Justice Douglas said:

The vitality of civil and political institutions in our society depends on free discussion. [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Terminello v. Chicago, 337 U.S. 1 at 4 (1949).

[45] "An old proverb warns us to take heed lest we 'walk into a well from looking at the stars.'" Ibid., 14.

[46] Ibid., 13.

[47] "It was a local manifestation of a world-wide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe." Ibid., 23.

[48] There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310.

Chaplinsky v. *New Hampshire*, 315 U.S. 568, 571-572

[49] *Terminello v. Chicago*, 337 U.S. 1 at 31 (1949).

[50] Ibid., 37.

[51] Richard A. Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), 115.

[52] 742 F.2d 1007 (7th Cir., 1984).

[53] Richard A. Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), 115.

[54] Alan Dershowitz, *Shouting Fire* (Boston: Little, Brown and Company, 2002), 416-418.

[55] Ibid., 419.

[56] "America has continued to seek a healthy balance between freedom and security. Crisis has usually been the impetus for any moves toward security." Roger Dean Golden, "What Price Security? The USA PATRIOT Act and American Balance Between Freedom and Security", ed. Russell Howard, James Forrest and Joanne Moore, *Homeland Security and Terrorism* (New York: McGraw Hill, 2006), 404.

[57] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 21.

[58] Ibid.

[59] Ibid., 16-29.

[60] Ibid. Recall that by this time, France had overthrown its monarchy and was a republic. See http://www.info-france-usa.org/atoz/history.asp; accessed 10 December 2007.

[61] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 16-29.

[62] Ibid., 33-73.

[63] An Act for the Punishment of Certain Crimes Against the United States, 5ty Congress, 2nd Session, Chapter 74 (1798). Although arguably an act necessary to protect the United States in time of impending peril from France, as Mr. Stone notes, the best circumstantial evidence of its true intent to stifle political dissent is in its very enactment. The Federalists provided the Sedition Act would expire when President Adams left office, thus ensuring that it could not be used against them if Republicans succeeded them in control of the government. Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 67. Although such may seem incredible to us now, the fracturing of the country as described by Mr. Stone in *Perilous Times* reminds the author of the vitriol between – and even among -- the parties in today's political arena.

[64] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 63 and 67. According to Mr. Stone, no Federalist was ever indicted, let alone convicted, under the Sedition Act.

[65] Ibid., 49 and 55.

[66] *Schenck* v. *United States*, 249 U.S. 47 at 48-9 (1919).

[67] Ibid.

[68] Ibid., 50-51.

[69] Ibid., 52.

[70] *Gitlow v. New York*, 268 U.S. 652 (1925).

[71] *Whitney* v. *California*, 274 U.S. 357 (1927).

[72] *Gitlow* involved the New York criminal anarchy statute, New York Penal Law Section 161 (1909), which stated:

> Any person who . . . [b]y word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence . . . [i]s guilty of a felony . . . .

In *Whitney*, the defendant was charged and convicted of violating the California criminal syndicalism act, as follows:

> Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet . . . any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage [which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property], or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change . . . [i]s guilty of a felony . . . .
>
> Both Gitlow and Whitney were members of the Socialist (later the Communist) party.

[73] *Schenck* (and associated cases from the WWI era) focused on speech as evidence of a substantive crime (there, leaflets were proof that the accused was fomenting the substantive crime – insurrection within the Army). In *Gitlow* and *Whitney*, there was no substantive crime for which speech was the evidence. The substantive crime was the substance of the speech itself. That this test evaluated the content of the speech itself would later become a major criticism of the clear and present danger test and its progeny. See note 118, *supra* and Justice Douglas' opinion in *Brandenburg,* note 119, *supra*.

[74] *Gitlow*, *supra* at 668. *Whitney*, *supra* at 371.

[75] U.S. Code, Title 18, Section 11 (1946).

[76] *Dennis v. United States*, 341 U.S. 494 at 509 (1951). Does this sound familiar? Similar concepts underlie the doctrine of preemption, discussed below.

[77] *Dennis v. United States*, 341 U.S. 494 at 510 (1951).

[78] The USA PATRIOT Act (hereinafter "the Act") also includes what many have identified as assaults upon civil liberties. See, for example, Nancy Chang, "The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?", in *Homeland Security and Terrorism,* ed. Russell Howard, James Forrest and Joanne Moore (New York: McGraw Hill, 2006), 368-83. While the Act does address surveillance, information sharing and criminal statutes, to name a few provisions, it does not expressly criminalize speech. (Ms. Chang would disagree, citing U.S. Code, Title 18, Section 2331 (2006), which defines "domestic terrorism".) Nor does the Act address the constitutional standard that should be applied to speech in the GWOT-era, which is the main thesis of this paper. Accordingly, other than to note the Act as an example to which some would point as an example of shrinking civil liberties in the face of peril, an in-depth analysis of the Act is beyond the scope of this paper.

[79] *Brandenburg v. Ohio*, 395 U.S. 444 at 446 (1969).

[80] Ibid.

[81] Ibid.

[82] "[In *Whitney* v. *California*, 274 U.S. 357 (1927), t]he [Supreme] Court upheld [a similar]. . . statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." Ibid., 447.

[83] Ibid., 448, citing *Noto* v. *United States*, 367 U.S. 290 at 297-298 (1961). Note that in *Brandenburg*, the Court specifically overruled *Whitney*, *supra*.

[84] Ibid.

[85] Ibid, 447, citing *Dennis* v. *United States*, 341 U.S. 494 at 507 (1951).

[86] *Brandenburg v. Ohio*, 395 U.S. 444 at 447 (1969). The Court in *Brandenburg* did not define "imminent". However, subsequent cases have shed some light on that term, seemingly limiting it to situations when the potential lawless action is very close in time. See *Hess v. Indiana*, 414 U.S. 105 at 108 (1973): "advocacy of illegal action at some indefinite future time" is not imminent, and *NAACP v. Claiborne Hardware*, 458 U.S. 886 at 928 (1982): advocacy of action "weeks or months" later is insufficient to trigger *Brandenburg's* imminence requirement.

[87] Justice Thomas, in a concurring opinion in *Morse v. Frederick*, 127 S. Ct. 2618 (2007) said: "In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. See *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) *(per curiam)*." By this statement, he is reaffirming the standard in *Brandenburg* that requires imminent threat before speech can be restricted. Note, however, that Justice Stevens, generally considered to be one of the liberal justices on the United States Supreme Court, has indicated his displeasure with the restrictive nature of the *Brandenburg* standard. In *Stewart v. McCoy*, 537 U.S. 993 (2002), McCoy was convicted of providing advice on how to operate a street gang. On appeal, the Ninth Circuit reversed the conviction, citing *Brandenburg,* and holding McCoy's conduct was mere advocacy and thus protected. Justice Stevens filed a statement regarding the Court's denial of a writ of certiorari, stating:

> Given the specific character of respondent's advisory comments, that holding is surely debatable. But whether right or wrong, it raises a most important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than "mere advocacy," *Brandenburg***,** 395 U.S. at 449.
>
> Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech. Our denial of certiorari in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.

Such a statement, from one of the Court's more liberal justices (and particularly after 9/11), is telling regarding the direction the Court might take when confronted with a GWOT related case.

[88] Mr. Cohen makes this very point:

> In cases involving religious sermons, the particular circumstances of delivery may be relevant. When a call to overthrow the "infidel" government is delivered by an earnest orator in a fiery manner to an impassioned, frenzied throng, the question of "proximity and degree" of danger may well be imminent, compared to a setting in which the delivery is lukewarm and the audience docile. If the adherents of the defendant's sect are an angry mob or in some other state of agitation, that circumstance is relevant because they are more amenable to be incited to undertake imminent lawless action.

John Alan Cohen, “Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government”, *St. John’s J. L. Comm.,* no. 17 (Winter/Spring 2003): 199, 219.

[89] *Brandenburg* v. *Ohio*, 395 U.S. 444 at 448 (1969).

[90] See note 48, *supra*. While free speech is constitutionally protected, human life is divinely protected. See Exodus, Chapter 20:13: "You shall not murder." Holy Bible, New International Version (Colorado Springs: International Bible Society, 1984). But note that even this protection is not without limitation; the Commandment does not prohibit killing itself, but only murder, which can for our purposes be considered as unlawful killing. That all killing is not proscribed can be implied from Jesus’ interaction with the centurion, during which Jesus does not condemn him for his choice of profession, but rather commends him for his faith. Matthew, Chapter 8:10. Holy Bible, New International Version (Colorado Springs: International Bible Society, 1984).

[91] *Stewart v. McCoy*, 537 U.S. 993 (2002).

[92] “Customary international law is not ‘black letter law’ in the sense that it is codified in statutes, treaties, or international agreements, but it is nonetheless widely viewed as law in the international context.” David S. Jonas, “The New U.S. Approach to the Fissle Material Cutoff Treaty: Will Deletion of a Verification Regime Provide a Way Out of the Wilderness?”, *Fla. J. Int’l L.*, no. 18 (2006): 597, 640.

[93] The Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (Charlottesville: U.S. Government Printing Office, 2006), Chapter 1, pages 5-6. See also U.S. Department of Defense, *Department of Defense Dictionary of Military and Associated Terms,* Joint Publication 1-02 (Washington, D.C.: U.S. Department of Defense, 12 April 2001 (as amended through 17 October 2007)), 424, defines preemptive attack as “[a]n attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent.” Certainly the requirement of “imminent” attack narrowly limits the concept of preemption. It is not without irony that this narrow interpretation was put forth by an American – Secretary of State Daniel Webster. When, in 1837, the British attacked an American ship they accused of carrying supporters of a rebellion against the British in Canada, the British claimed it was done in self-defense. In response, Webster argued such a right does not exist unless “the necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment of deliberation.” The Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (Charlottesville: U.S. Government Printing Office, 2006), Chapter 1, pages 5-6. For excellent discussions of the distinctions between preemption and prevention, see Jeffrey Record, “The Bush Doctrine and the War with Iraq”, *Parameters* (Spring 2003): 7 and Colin S. Gray, *The Implications of Preemptive and Preventive War Doctrines: A Reconsideration* (Carlisle: Strategic Studies Institute, U.S. Army War College, 2007.), 8-14.

[94] The Judge Advocate General’s Legal Center and School, *Operational Law Handbook* (Charlottesville: U.S. Government Printing Office, 2006), Chapter 1, pages 5-6. See also U.S. Department of Defense, *Department of Defense Dictionary of Military and Associated Terms,* Joint Publication 1-02 (Washington, D.C.: U.S. Department of Defense, 12 April 2001 (as amended through 17 October 2007)), 427, defines preventive war as “A war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk.” Professor Gray’s discussion of the distinctions between preemption and

prevention are fascinating, but an in-depth discussion of the distinction is not required for this analogy. For those seeking a deeper understanding of the distinctions between preemption and prevention, this author commends Colin S. Gray, *The Implications of Preemptive and Preventive War Doctrines: A Reconsideration* (Carlisle: Strategic Studies Institute, U.S. Army War College, 2007). Professor Gray apparently also believes – as does this author – that the Bush administration has misapplied the term preemption when it actually means prevention. Ibid., v, 2 and 6. Professor Gray argues one distinction between preemption and prevention is that in the former, the decision to use force has "been taken out of [the preemptor's] hands." Ibid., 11. "This concept [of preemption] has been employed promiscuously to encompass any and all cases of the first use of military force intended to beat the enemy to the punch, even when that enemy is nowhere ready to throw punches." Ibid., 6-7. However, those who may support the Bush administration's use of "preemption" certainly have an argument that the events of September 11, 2001 were the first punches.

[95] "To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively in exercising our inherent right of self-defense." George W. Bush, *National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 18. "If necessary, however, under long-standing principles of self-defense, we do not rule out the use of force before attacks occur, *even if uncertainty remains as to the time and place of the enemy's attack*." Ibid., 23 (emphasis added). This description strikes the author – and apparently many others -- as prevention, not preemption. See Colin S. Gray, *The Implications of Preemptive and Preventive War Doctrines: A Reconsideration* (Carlisle: Strategic Studies Institute, U.S. Army War College, 2007), 6. Whether the Bush administration should have been more intellectually honest in terminology by using the term "prevention," and the damage caused to the legitimate concept of preemption by such a mischaracterization – while fascinating issues – are beyond the scope of this paper.

[96] George W. Bush, *National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 18.

[97] Vice President Cheney has also described what has been called the "one percent doctrine" thus: "If there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. It's not about our analysis ... It's about our response."

[98] The problem with imminence as a standard is brought into sharper relief if we consider Internet speech. As one commentator notes, "[i]s the imminence to be calculated from the time the Web page is posted, or from the time it is read?" Tiffany Komasara, "Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications", *Cap. U. L. Rev*., no. 29 (2002): 835, 848. This paper addresses the standard to be applied to the contents of Osama bin Laden's fatwa – the method of delivery is immaterial. However, this astute observation about the Internet merely highlights the limitations of the current *Brandenburg* "imminence" standard in the GWOT.

[99] Richard A. Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), 122.

[100] The "threat" then, would be drawn from the totality of the circumstances surrounding that evil – including the computation of the immediacy of the evil occurring, the likelihood of the evil occurring and the magnitude of the harm caused if the evil did occur.

[101] One commentator has recognized that courts may well find *Brandenburg* too restrictive given the GWOT threat: "Confronted by possible terrorist acquisition of biological or nuclear weapons, courts may well lower the bar." Laura K. Donohue, "Terrorist Speech and the Future of Free Expression", *Cardozo Law Review,* no. 27 (October 2005): 233, 240. This commentator also states *Dennis* might be a more appropriate standard, rather than *Brandenburg:* "And, while *Brandenburg* overturned *Whitney*, it stopped short of overturning *Schenck*, *Dennis*, or *Yates*. These cases go to the heart of what constitutes a 'clear and present danger' - a test that is possibly more fitting in the coming geopolitical environment." Ibid., 339. "Chief Justice Vinson's words strike a particular chord when held against contemporary biological and nuclear threats: 'In each case [courts] must ask whether the gravity of the "evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" Ibid., 247. See also Andrew C. McCarthy, "Free Speech for Terrorists?", March 2005; available from https://www.commentarymagazine.com/viewarticle.cfm/Free-Speech-for-Terrorists--9864?page=all; accessed 13 February 2008, which finds merit with the *Dennis* standard as a means of regulating terrorist speech.

[102] See note 86, *supra*. "Because of the necessity to show that the speech in question is advocating imminent lawless action, the exception provided by the Court in Brandenburg is narrow and difficult to satisfy, triggering the strictest scrutiny by the courts in order that the broadest spectrum of ideas can be freely exchanged in the public discourse." Thomas E. Crocco, "Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites", *St. Louis U. Pub. L. Rev.*, no. 23 (2004): 451, 455.

[103] See note 95, *supra*.

[104] Some commentators do argue that language such as Osama bin Laden's fatwa would not be protected, even under *Brandenburg*, because the speech would satisfy the "imminence" test. See generally, Tracey Topper Gonzalez, "Individual Rights Versus Collective Security: Assessing the Constitutionality of the USA Patriot Act", *U. Miami Int'l & Comp. L. Rev*., no. 11 (Fall 2003): 75, 94, note 122; Lauren Gilbert, "Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism", *U. Miami L. Rev*., no. 58 (April, 2004): 843, 866, note 147. See also Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", *Am. U. L. Rev*., no. 55 (February 2006): 785, 816. Mr. Tanenbaum does not advocate "a return to pre-Brandenburg model [that is, *Dennis*]", because he believes such language fits the Brandenburg requirement of "imminence". Ibid., 815. See also Kenneth Lasson, "Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty", *Whittier L. Rev*., no 27 (Fall, 2005): 3, 63. Mr. Lasson argues that "[t]he threshold of imminence is lower than ever before" and "[t]errorism creates a kind of permanent imminence." Ibid., 71, 74. This aptly demonstrates the danger in expanding the imminence requirement. If the definition of imminence is expanded to mean permanence, it is useless as a protection. Mr. Crocco makes a similar argument in his article, "Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites", *St. Louis U. Pub. L. Rev.*, no. 23 (2004): 451, 482: "Until terrorism is removed from the world, there exists a 'threshold of imminence' such that the potential for additional terrorist acts is so great that they must be considered imminent. Under these circumstances, terrorist websites advocating acts intended to destroy our society do not warrant the protection of the First Amendment." Stretching the concept of imminence to the breaking point to cover situations like the hypothetical here, strikes the author as a sound reason to revisit the standard itself.

[105] John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm*., no. 17 (Winter/Spring 2003): 199, 204. See also Kenneth Lasson, "Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty", *Whittier L. Rev*., no 27 (Fall, 2005): 3, 63. However, Mr. Cohen also notes testimony in Shiek Rahman's trial that fatwas are merely "opinion[s] . . . [which do] not command . . . anything." John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm*., no. 17 (Winter/Spring 2003): 199, 227.

[106] Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", *Am. U. L. Rev*., no. 55 (February 2006): 785, 806. Again, this is the primary objection to *Dennis* – that is requires the Court to pass judgment on the content of the speech itself.

[107] One commentator has suggested content-considering standards for evaluating speech. See Tiffany Komasara, "Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications", *Cap. U. L. Rev*., no. 29 (2002): 835, 854.

[108] "To the extent that we need to factor in the imminence of a threat, Learned Hand's formula, "the gravity of the 'evil' discounted by its improbability," should serve us well. The evil here could not be graver, and it is beyond calculations of probability—this enemy has killed repeatedly, and promises to kill anew." Andrew C. McCarthy, "Free Speech for Terrorists?", March 2005; available from https://www.commentarymagazine.com/viewarticle.cfm/Free-Speech-for-Terrorists--9864?page=all; accessed 13 February 2008.

[109] Richard A. Posner, *Not a Suicide Pact* (New York: Oxford University Press, 2006), 122.

[110] "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." *Dennis v. United States*, 341 U.S. 494 at 509 (1951)(Vinson, J.).

[111] The majority opinion in *Brandenburg* did not appear to view their standard as a clear repudiation of the *Dennis* standard, but rather a clarification of it. On the other hand, Justice Douglas, in his concurring opinion, was very candid in his criticism of the *Dennis* standard: "But in *Dennis* v. *United States*, 341 U.S. 494, we opened wide the door, distorting the 'clear and present danger' test beyond recognition." *Brandenburg* v. *Ohio*, 395 U.S. 444 at 453 (1969).

[112] Geoffrey R. Stone, *Perilous Times* (New York: W.W. Norton and Co., 2004), 7.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] "We assess that al-Qa'ida will continue to try to acquire and employ chemical,

biological, radiological, or nuclear material in attacks and would not hesitate to use them if it develops what it deems is sufficient capability." National Intelligence Council, *National Intelligence Estimate, The Terrorist Threat to the US Homeland* (July 2006): 6, available from http://www.dni.gov/press_releases/20070717_release.pdf, accessed 4 February 2007.

[117] One need only look to the events of September 11, 2001 as an example.

[118] The principle objection to *Dennis* appears to be that it contains a content-based element. See Daniel T. Kobil, "Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era", *U. Toledo L. Rev*., no. 31 (Winter, 2000): 227, 235: "[*Brandenburg*] is widely considered to be a substantial improvement . . . over the content-sensitive approaches that the Court once used in the area of speech advocating unlawful conduct." "[The *Dennis* test is] clearly at odds with the modern understanding that the First Amendment prevents government from punishing speech based on 'disapproval of the ideas expressed.'" Ibid., 237, citing *R. A. V.* v. *City of St. Paul*, 505 U.S. 377 at 382 (1992).

[119] "But in *Dennis* v. *United States*, 341 U.S. 494, we opened wide the door, distorting the "clear and present danger" test beyond recognition." *Brandenburg* v. *Ohio*, 395 U.S. 444 at 453 (1969).

[120] See, for example, Daniel T. Kobil, "Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era", *U. Toledo L. Rev*., no. 31 (Winter, 2000): 227, 235; Robert S. Tanenbaum, "Preaching Terror: Free Speech or Wartime Incitement?", *Am. U. L. Rev*., no. 55 (February 2006): 785, 816.

[121] For example, Mr. Cohan agrees with Justice Douglas that the "'clear and present danger' [standard, upon which *Dennis* is based, can be easily] manipulated to crush what [Justice] Brandeis [in *Pierce v. United States*] called 'the fundamental right of free men to strive for better conditions through new legislation and new institutions' by argument and discourse . . . even in time of war." *Brandenburg* v. *Ohio*, 395 U.S. 444 at 452 (1969). See also John Alan Cohen, "Editious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government", *St. John's J. L. Comm*., no. 17 (Winter/Spring 2003): 199, 245.

[122] *Maryland v. Pringle*, 540 U.S. 366, 371 (2003), based on *Illinois v. Gates*, 462 U.S. 213, 230-31, that the totality of the circumstances approach is the standard for probable cause.

[123] See note 48, *supra*. The Supreme Court has also noted that certain types of speech contribute so minimally to the marketplace of ideas that eliminating them from the marketplace is not constitutionally abhorrent. The Constitution allows "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R. A. V.* v. *City of St. Paul*, 505 U.S. 377 at 382-383 (1992), quoting *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 at 572 (1942). I would argue that advocating destruction of our democracy and society by violence falls squarely within the category of de minimis contribution to the marketplace.

[124] "It is precisely during times of crisis – when the balance between momentary expediency and enduring safeguards goes askew – that courts can perform their most critical

function: to restore and preserve a sense of perspective." Alan Dershowitz, *Shouting Fire* (Boston: Little, Brown and Company, 2002), 429.

[125] Those who would argue the courts have done a poor job of defending constitutional rights do have some ammunition from these and other cases. Few would argue the Supreme Court was aggressive in protecting minority rights during times of national stress in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Dred Scott v. Sandford*, 60 U.S. 393 (1857), or *Korematsu v. United States*, 323 U.S. 214 (1944).

[126] However, at other times, the judiciary has held governmental action, arguably necessary in the face of national crisis, to be unconstitutional. See *Ex parte Merryman*, 1 Taney 246 (1861), *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Consider the Court's comment in *Hamdi* at page 536: **"**We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

[127] "[F]reedom of speech exists only under law and not independently of it." *Terminello v. Chicago*, 337 U.S. 1 at 31 (1949).

[128] See *Dennis v. United States*, 341 U.S. 494 at 509 (1951)(Vinson, J.): "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

[129] In a 1755 letter from the Pennsylvania Assembly to the Governor of Pennsylvania, Benjamin Franklin said: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." Leonard W. Labaree, ed., *The Papers of Benjamin Franklin*, vol. 6 (n.p.: 1963), 242, quoted in Suzy Platt, ed., *Respectfully Quoted* (Washington, D.C.: Library of Congress, 1989), 201.